



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. E 385 OF 2019**

**COLLOGNE INVESTMENTS LIMITED.....PLAINTIFF**

**- VERSUS -**

**BANK OF AFRICA KENYA LIMITED.....DEFENDANT**

**NAKUMATT HOLDINGS LIMITED**

**(UNDER ADMINISTRATION).....PROPOSED INTERESTED PARTY**

**RULING**

1. It is undenied that at the application of the interested party **NAKUMATT HOLDING LTD** (under administration) the defendant, **BANK OF AFRICA KENYA LIMITED**, on diverse dates between the years 2013 to 2015 advanced to the interested party various loans and credit facilities. Those facilities were secured by amongst other securities a third party legal charge over the plaintiff's (**COLLOGNE INVESTMENTS LTD**) property being L.R. NO. 209/11158. That charge was to operate as a continuing security for the payment and discharge of an aggregate sum of Ksh 700 million advanced to the interested party. It is also not denied that the plaintiff consented, in the form of director's resolutions, to the advances made by the defendant to the interested party.

2. The plaintiff filed a Notice of motion application dated 1<sup>st</sup> November 2019 seeking interlocutory injunction to restrain the defendant bank from selling the charged property in exercise of its statutory power of sale. This court by its Ruling, dated 18<sup>th</sup> June 2020, that Notice of Motion dated 1<sup>st</sup> November 2019 was dismissed. The plaintiff filed a Notice of Appeal dated 23<sup>rd</sup> June 2020 against that dismissal.

3. The plaintiff has presented a Notice of Motion application dated 15<sup>th</sup> July 2020 seeking an injunction pending that appeal. That application is premised on the grounds that it has filed the appeal, that the defendant bank has scheduled the auction of the charged property on 24<sup>th</sup> August 2020, that this court has power to grant an injunction pending appeal, that the plaintiff will suffer substantial and irreparable loss if the defendant is not restrained from disposing the charged property, that the charged property serves as office premises of the plaintiff and the interested party, that the charged property is also charged to other banks and if the plaintiff does sell the same all other creditors stand a chance of losing their security and that the defendant bank is well secured by the charge over the charged property.

4. The defendant bank, through the affidavit of **Githagui Morgan Kinyanjui** confirmed that it intends to auction the charge property on 24<sup>th</sup> August 2020 in exercise of its statutory power of sale. The defendant opposes the application on the grounds that the debt to the bank is not denied and in any event the bank cannot be restrained on the ground of dispute of the amount due, the bank's statutory notices of sale are lawful and valid, the defendant bank's right to exercise the statutory power of sale is unaffected by the insolvency of the interested party and that the plaintiff has not proved that the defendant bank clogged its equity of redemption.

**ANALYSIS AND DETERMINATION**

5. Injunction like all other equitable reliefs is discretionary. As stated before the plaintiff seeks injunction pending its appeal to the court of appeal. A judge is not stripped of his jurisdiction to grant stay or injunction when an appeal is pending. See **ORION PROPERTY TRUST LTD V DU CANE COURT LTD (1962) 3 ALL ER 466**. This was also the finding of the court of appeal in the case **MADHUPAPER INTERNATIONAL LTD V KERRI (1985) eKLR** thus:

*“The reasoning of the learned judge was, with respect, incorrect. He was referred to **Erinford Properties Ltd v Cheshire County Council, [1974] 2 All ER 443** in which Mr Justice Megarry held that where a judge dismissed an application for interlocutory injunction he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal. It is unnecessary for him to apply to the Court of Appeal for it. There is no inconsistency in doing so. The purpose of granting one having just refused to do it is to prevent the decision of the Court of Appeal being nugatory should it reverse the judge below,*

which sometimes happens.

*In Erinford's case the unsuccessful applicant moved ex parte for the injunction pending the appeal which Megarry, J granted .....*

*Megarry, J granted the intended injunction pending appeal which the applicant sought on the principle that-*

*“when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not nugatory.”*

6. Justice Alnashir Visram (as he then was) in the case **PATRICIA NJERI & 3 OTHERS V NATIONAL MUSEUM OF KENYA (2004) eKLR**, discussed the court's power to grant an injunction pending appeal and state thus:

*“The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application?”*

*In the Venture Capital case the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:*

*(a) The discretion will be exercised against an Applicant whose appeal is frivolous (See Madhupaper International Limited vs Kerr (1985) KLR 840 (cited in Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (J. K. Industries vs KCB (1982 – 88) KLR 1088 (also cited in Venture Capital))*

*(b) The discretion should be refused where it would inflict greater hardship than it would avoid (See Madhupaper supra).*

*(c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See Butt vs Rent Restriction Tribunal (1982) KLR 417 (cited also in Venture Capital)).*

*(d) The Court should also be guided by the principles in Giella vs Cassman Brown & Company Ltd (1973) EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital).”*

7. The court of appeal did in the case of **MADHUPAPER** (supra) further state:

*“There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not experienced yet.”*

8. This court by its previous Ruling dated 18<sup>th</sup> June 2020 found that the plaintiff's dispute of the amount due to the defendant bank cannot be a basis for granting an injunction. The plaintiff has additionally sought, by the present application, to argue that the charged property is security for other banks and that if the charged property is auction it will lose office space and will be liable for damages to parties who have rented office space thereof.

9. I wish to repeat what was stated in the Ruling of 18<sup>th</sup> June 2020 that the bank should not be restrained because of dispute of the amount due: see the case **MRAO LTD v FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) eKLR**. Similarly, an injunction cannot be granted on the basis that the charged property is security to other banks. The defendant bank through the affidavit of **Githagui Morgan Kinyanjui** stated that the charged property is security to other banks under a syndicate agreement.

10. I am aware as was stated by **Megarry J** in the case **ERINFORD PROPERTIES LTD V CHESHIRE COUNTY COUNCIL (1974) 2 ALL ER 448** that my previous holding in this case may be reversed by the court of appeal. In that case **Magarry J** stated:

*“Judges must decide cases even if they are hesitant in their conclusions: and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanation of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative efforts of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal.”*

11. However, bearing what is before me I am of the view that the plaintiff has failed to demonstrate that its appeal is not frivolous and I do find that the defendant bank stands to suffer greater hardship if an injunction is granted since the debt is not being serviced.

12. It is for that reason that the Notice of Motion application dated 15<sup>th</sup> August 2020 is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF AUGUST 2020.**

**MARY KASANGO**

**JUDGE**

Before Justice Mary Kasango

C/A Sophie

For the Plaintiff:

For the Defendant:

For the Interested Party:

**ORDER**

This decision is hereby virtually delivered this 12<sup>th</sup> day of **August, 2020**.

**MARY KASANGO**

**JUDGE**